Meredith Corporation *and* Screen Actors Guild (SAG)-American Federation of Television and Radio Artists (AFTRA), Kansas City Local. Cases 17–CA–077657 and 17–RC–068104

December 10, 2014

DECISION, CERTIFICATION OF REPRESENTATIVE, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On June 14, 2012, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 57. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has consolidated the underlying representation proceeding with this unfair labor practice proceeding and delegated its authority in both proceedings to a three-member panel.

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding.[1] The Board's June 14, 2012 decision states that the Respondent is precluded from litigating any representation issues because, in relevant part, they were or could have been litigated in the prior representation proceeding. The prior proceeding, however, also occurred at a time when the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, and we do not give it preclusive effect. Accordingly, we consider below the representation issue that the Respondent has raised in this proceeding.

In its response to the Notice to Show Cause, the Respondent reiterates its argument that its news producers are statutory supervisors and thus are not eligible for inclusion in any bargaining unit. In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the Respondent's argument, and find it without merit.[2] Accordingly, we deny the Request for Review in the prior proceeding, as it raises no substantial issues warranting review.[3]

Having resolved the representation issues raised by the Respondent in this proceeding, we next consider the question whether the Board can rely on the results of the election. For the reasons stated below, we find that the election was properly held and the tally of ballots is a reliable expression of the employee's free choice.

As an initial matter, had the Board decided not to issue decisions during the time that the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm, the Regional Director would have conducted the election as scheduled and counted the ballots. In this regard, Section 102.67(b) of the Board's Rules and Regulations states, in relevant part:

> The Regional Director shall schedule and conduct any election directed by the [Regional Director's] decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a re-

[1] American Federation of Television and Radio Artists, Kansas City Local (AFTRA), Kansas City Local represented a unit of the Respondent's employees employed in the news department. On November 2, 2011, AFTRA Kansas City Local filed the petition in the underlying representation case proceeding seeking a self-determination election among the news producers to determine whether they wished to be included in the existing unit. About March 30, 2012, the American Federation of Television and Radio Artists (AFTRA) merged with the Screen Actors Guild (SAG) to form SAG-AFTRA. Thereafter, AFTRA Kansas City Local affiliated with SAG-AFTRA to form SAG-AFTRA, Kansas City Local. It is undisputed that SAG-AFTRA, Kansas City Local is the successor of AFTRA Kansas City Local. Thus, on all dates before March 30, "the Union" will refer to AFTRA Kansas City Local, and on all dates on or after March 30, "the Union" will refer to SAG-AFTRA, Kansas City Local. The case heading has been corrected to reflect the identity of the bargaining representative.

[2] Sec. 102.67(d) of the Board's Rules and Regulations permits the Board, in its discretion, to examine the record when evaluating a request for review. The Board has reviewed the record in this case.

[3] In denying review, we recognize that *KGW-TV*, 329 NLRB 378 (1999), which was discussed by the Regional Director, issued prior to the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), and the Board's decision in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), in which the Board refined its test for determining supervisory assignment and responsible direction. We nevertheless agree with the Regional Director that under the *Oakwood* standard, the Employer has failed to establish that the news producers assign or responsibly direct employees or possess any other indicia of supervisory authority within the meaning of Sec. 2(11) of the Act.

> quest shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted[,] ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision. (Emphasis in original.)

See also Casehandling Manual, Part 2, Representation Proceedings, Sections 11274, 11302.1(a) (same).

However, this vote and impound process does not apply when the Board lacks a quorum. In this regard, Section 102.182 of the Board's Rules and Regulations states:

> *Representation cases should be processed to certification*.—During any period when the Board lacks a quorum, the second proviso of § 102.67(b) regarding the automatic impounding of ballots shall be suspended. To the extent practicable, all representation cases should continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Thus, it is clear that the decision of the Board to continue to issue decisions did not affect the outcome of the election. With or without a decision on the original Request for Review, the election would have been conducted as scheduled. This result is required by Section 102.67(b) of the Board's Rules, and, under *Noel Canning*, the sitting Board Members did not have the authority to issue an order directing otherwise. Thus, the timing of the election was not affected by the issuance of a decision on the Request for Review, and we find that the decision of the Regional Director to open and count the ballots was appropriate and in accordance with Section 102.182. In any event, the actions of the Regional Director did not affect the tally of ballots. Accordingly, we will rely on the results of the election and issue an appropriate certification.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Screen Actors Guild (SAG)-American Federation of Television and Radio Artists (AFTRA), Kansas City Local, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All announcers, anchors, reporters/newscasters, directors, chief directors, news photographers, multi-media journalists, news editors, news producers, and production assistants. Excluding all office clerical employees, salespersons, guards, professional and supervisory employees as defined in the Act, and all other employees.[4]

NOTICE TO SHOW CAUSE

As noted above, the Respondent has refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although the Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before December 22, 2014, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before January 5, 2015.

3. NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before January 26, 2015 (with affidavit of service on the parties to this proceeding), as to why the Board should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C. December 10, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON CONCURRING.

I agree with my colleagues' conclusion that the Respondent's Request for Review of the Regional Director's decision presents no issues warranting review. The Respondent failed to carry its burden under Section 102.67(c) of the Board's Rules and Regulations to show that the Regional Director's decision departs from Board precedent or was clearly erroneous on a factual issue in

[4] Although the unit description in the complaint includes "technical producers," the General Counsel's motion indicates that the parties have agreed that the technical producers are not included in the previously-existing unit. Therefore, we have corrected the unit description to exclude them.

finding that the news producers do not exercise supervisory authority pursuant to Section 2(11) of the Act. In my view, the facts present a close question regarding whether the Respondent's news producers responsibly direct the work of other employees pursuant to the definition of that indicia of supervisory authority explained by the Board in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691–692, 694–695 (2006), and its companion case *Croft Metals, Inc.,* 348 NLRB 717, 722 (2006). Although I disagree with the way the Board has sometimes applied the *Oakwood* test for responsible direction in subsequent cases, I find that under any version of the test, the Respondent has failed to establish supervisory authority on this record.

As expressed in *Oakwood Healthcare*, above: "for direction to be 'responsible,' the person directing . . . must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks . . . are not performed properly." Id. at 691–692. In *Croft Metals, Inc.*, above, the Board found that lead persons were held accountable for the job performance of employees assigned to them where the Respondent had issued warnings to the lead persons "because of the failure of their crews to meet production goals or because of other shortcomings of their crews." Supra at 722. Subsequently, a panel majority in *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (2011), narrowly interpreted this standard to preclude a showing of accountability by evidence that putative supervisors had been disciplined for their *own* work deficiencies. The *Entergy* Board held that the proper evidentiary focus there should have been on discipline of the supervisors for *their supervisees' deficiencies*. Id. at slip op. at 5–7. In my view, this is an inappropriately narrow interpretation of *Oakwood Healthcare* because certain supervisory duties are inherently linked to the performance of subordinates. A supervisor who is personally judged to be deficient in "management," for example, is being judged on how poorly his or her group happens to be doing. Thus, both the Board's decision in *Croft Metals*, above, and common sense dictate that when a putative supervisor who directs other employees is responsible for the group's performance, as shown either by potential discipline or reward to the putative supervisor on the basis of the performance of the group, or employees within the group, the putative supervisor is "accountable" for the performance of the group and the employees in it. Cf. *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 9 (Member Hayes, dissenting) ("accountability focuses on the supervisor's own conduct and judgment in exercising oversight and direction of employees in order to accomplish the work"). See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 fn. 13 (2006), in which the board indicated that "accountability" may also be shown by the prospect of a positive effect upon a putative supervisor's terms and conditions of employment.

Here, although it is clear that the news producers direct the work of other employees when they plan for, coordinate, and execute the production of daily news shows, the Respondent has not established that the news producers are held accountable for more than coordination, cooperation, and attention to detail. For example, Respondent's Exhibit 4 documents that a news producer was disciplined for failing to ensure that facts and graphics were presented accurately, for failing to properly communicate with other news room personnel, and for failing to take charge of his show. It fails to demonstrate, however, that the news producer was held accountable for the *group's* performance, as opposed to his own failure to catch and correct mistakes or to coordinate and properly execute the show. Thus, upon careful examination, I find the record fails to establish the requisite "accountability" pursuant to *Oakwood Healthcare* and *Croft Metals*.

Because the requisite showing of accountability has not been made, and therefore "responsible direction" of work has not been established, I find it unnecessary to pass on whether the Respondent met its burden under Section 102.67(c) of the Board's Rules and Regulations in contending that the Regional Director erred in finding that news producers did not use independent judgment in the responsible direction of work.

Dated, Washington, D.C. December 10, 2014

Harry I. Johnson, III, Member

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